

OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE

RICHARD A. MULLANEY
GENERAL COUNSEL

CINDY A. LAQUIDARA
CHIEF DEPUTY GENERAL COUNSEL



CITY HALL, ST. JAMES BUILDING
117 WEST DUVAL STREET, SUITE 480
JACKSONVILLE, FLORIDA 32202

JOHN T. ALDERSON, JR.
MICHAEL J. ARINGTON
THOMAS M. BEVERLY
DEBRA A. BRAGA
BRUCE S. BULLOCK, JR.
WILLIAM B. BURKETT
KAREN M. CHASTAIN
DERREL Q. CHATMON
DAVID J. D'AGATA
SHANNON K. ELLER
LOREE L. FRENCH
JOHN F. GERMANY, JR.
SEAN B. GRANAT
LAWSIKIA J. HODGES
MARY W. JARRETT
HOWARD M. MALTZ
NEILL W. MCARTHUR, JR.
JAMES R. MCCAIN, JR.
CAROL MIRANDO

MICHELLE M. MOORE
ERNST D. MUELLER
WENDY L. MUMMAW
DOUGLASS E. MYERS, JR.
VIRGINIA B. NORTON
GAYLE PETRIE
JON R. PHILLIPS
STEPHEN J. POWELL
DYLAN T. REINGOLD
STEVEN E. ROHAN
JULIANA ROWLAND
CHERRY A. SHAW
MARGARET M. SIDMAN
JEFFREY D. SMITH
EDWARD C. TANNEN
JASON R. TEAL
JOEL B. TOOMEY
DEBORAH D. WALTERS
MICHAEL B. WEDNER

December 18, 2008

The Honorable Kevin E. Hyde
Councilman At Large, Group 4
Office of the City Council

Subject: Legislative Authority to Waive Certain Provisions of the Jacksonville Ordinance Code in Proposed Ordinance 2008-538 Authorizing the Amended and Restated Landfill Operation and Construction Agreement between the City and Trail Ridge Landfill, Inc. (the "Agreement")

Dear Councilman Hyde:

You have requested a written opinion regarding the Jacksonville City Council's legal authority to waive certain provisions of the Jacksonville Ordinance Code ("Ordinance Code") in pending Ordinance 2008-538 authorizing the above Agreement.

Legal Question Presented

Whether the Jacksonville City Council ("Council") may legally pass an ordinance (2008-538) waiving certain provisions of Chapter 126 of the Ordinance Code, and certain other Ordinance Code provisions, in connection with the authorization of the Agreement, which pertains to the operation of the Trail Ridge Landfill and the construction of a new or expanded landfill cell/facility at the Landfill site.

Office Telephone
(904) 630-1700

Writer's Direct Line
(904) 630-7503

Facsimile
(904) 630-1731

Writer's E-Mail Address
JGermany@coj.net

Office Web Site
GeneralCounsel.coj.com

Short Answer

Yes. Section 3.01 of the Charter of the City of Jacksonville (“Charter”) grants to the Council broad powers to enact legislation except where the legislation is in conflict with the general laws of Florida¹ or the Florida Constitution. In this case, there are no conflicting provisions in the general laws or Constitution of Florida. Although the Florida Statutes and case law indicate that the public policy of the state is to require competitive bidding of significant public contracts like the subject Agreement, the waivers at issue are not unlawful and are therefore permissible under Florida law.

Discussion

1. Introduction

The City owns the Trail Ridge Landfill located in Baldwin, Florida (the “Landfill”), on City property consisting of approximately 978 acres (the “Site”). The City competitively procured the construction and operation of the existing landfill facility or cell in the early 1990’s, and Trail Ridge Landfill, Inc., a subsidiary of Waste Management Inc. of Florida (“Contractor”), was chosen to construct and operate the facility/cell on an approximately 144 acre defined area within the Site (the “Existing Cell”). The City and Contractor previously entered into the Landfill Operation Agreement (the “Existing Operation Agreement”) and the Landfill Design and Construction Agreement, both dated June 26, 1991, for the permitting, design, construction and operation of the Existing Cell.

The Existing Cell has a remaining operational life under applicable permits of approximately five to seven years, and the City has a long-term continuing need for the unbuilt portion of the Landfill beyond the Existing Cell’s operational life. The City and Contractor disagree as to the remaining term of the Existing Operation Agreement. The Contractor asserts that it extends to the life of the Site and includes the construction and operation of additional landfill cells at the Site adjacent to or near the Existing Cell. Conversely, the City asserts that the Existing Operation Agreement extends only to the remaining useful life of the Existing Cell, and does not include any additional cells that may be permitted and constructed in the future on the Site.

The Agreement would resolve this longstanding “life of Site” vs. “life of cell/facility” dispute by allowing Contractor to (i) continue to operate the Landfill for the life of the Existing Cell, and (ii) construct and operate a new landfill cell (and/or an expansion of the Existing Cell) at the Site (the “Expanded Cell”) that would exhaust the landfill capacity of the entire Site. In exchange for that right, the Contractor would agree to assume the expensive closure and post-closure obligations mandated by state law pertaining to the Existing Cell, for which the City is currently responsible under the

¹ “General laws” are state statutes that apply across the state, as opposed to laws of specific application that address issues of a specific local government and do not apply statewide.

Existing Operation Agreement. Additionally, the Contractor would agree to reduce the per ton rate for waste disposal at the Site currently charged by Contractor under the Existing Operation Agreement.

The City would forego the above cost savings if the Council decided to competitively procure a new operations agreement for the Expanded Cell. In that event, the Existing Operation Agreement would remain in effect for the next five to seven years with its higher per ton rate and with its present obligation for the City to pay for the closure costs of the Existing Cell.

If the Council approved 2008-538, the operations portion of the Agreement would not be competitively bid, and neither would certain small construction or engineering projects that are not required by state law to be competitively procured. Proposed Ordinance 2008-538 therefore includes a waiver of the competitive bidding requirements under Chapter 126, Ordinance Code, which the City would otherwise be required to follow in the absence of the waiver.

The Agreement also provides for the Contractor to arrange for the permitting and construction of the Expanded Cell, and the Florida Statutes require competitive procurement of those types of municipal permitting and construction activities over a certain threshold amount. See Florida Statutes Sections 255.20 (requiring competitive bidding of certain public construction projects), 287.055 (requiring competitive solicitation of certain engineering and other professional services projects), and 180.24 (requiring competitive bidding of certain municipal utility projects). Thus, the Agreement expressly requires the Contractor to comply with the statutory competitive procurement requirements that are applicable to the permitting and construction of the Expanded Cell (see Agreement Sections 2.1 and 2.13). The competitive bidding waivers in 2008-538 apply only to the operations portion of the Agreement and to small construction and engineering projects under the statutory threshold amounts (in which case the Contractor is still required to obtain multiple bids under a simplified procurement procedure set forth in Section 2.13 of the Agreement).

Proposed Ordinance 2008-538 also waives certain provisions of Chapter 122, Ordinance Code, pertaining to the sale of City property, because the Agreement contains a purchase option in favor of Contractor if the City terminates the Agreement without cause. The proposed ordinance further waives Section 386.202(c), Ordinance Code, which requires a specific term for City landfill agreements, because the term of the subject Agreement is based on the delivery of certain waste tonnage amounts to the Landfill. The date when those amounts will be delivered is presently undeterminable and hence cannot be specified in the Agreement.

2. General Authority for Waiver of the Ordinance Code by Council.

The legal authority for the waivers in 2008-538 begins with Section 3.01(a) of the City's Charter, which grants to the City broad governance powers "including, but not

limited to, all powers of local self-government and home rule not inconsistent with general law” granted to counties, municipalities and consolidated governments under Article VIII, sections 1(g), 2(b), and 3, of the Florida Constitution, and sections 125.85, 125.86, 166.021, 166.031 and 166.042 of the Florida Statutes. Thus, the City’s governance powers as a consolidated government include the governance powers of both counties and municipalities.

Additionally, Charter Section 3.01(b) provides as follows:

with respect to Duval County, except as expressly prohibited by the Constitution or general laws of the State of Florida...[the Council] may enact or adopt any legislation concerning any subject matter upon which the Legislature of Florida might act...[and] may enact or adopt any legislation that the Council deems necessary and proper for the good government of the county or necessary for the health, safety, and welfare of the people....

In this case, the matters that 2008-538 proposes to waive are not expressly required by any state statute or constitutional provision. Thus, 2008-538 is not inconsistent with general law. Moreover, the subject Agreement for the construction and operation of an expanded Landfill pertains to an essential government function of providing for the disposal of commercial and residential waste, and hence is necessary for the “health, safety and welfare” of the citizens of Jacksonville. The subject waivers therefore fall within the broad governance powers granted to the Council under the City’s Charter.

Florida courts recognize the power of counties and municipalities to waive ordinance code provisions in a subsequent ordinance. See, e.g., Barnes v. City of Miami, 47 So.2d 3 (Fla. 1950); and Cook v. Navy Point, Inc., 88 So.2d 532 (Fla. 1956). In Barnes v. City of Miami, the Florida Supreme Court considered whether certain local government actions were “legislative” or “administrative” in nature, and concluded in part that “waivers of the City building code” were “characteristically legislative.” 47 So.2d at 6. According to the Court, “waivers of the City building code...[and] changes in zoning restrictions...must be done through the adoption of ordinances by the legislative body of the City...” Id. Although Barnes primarily dealt with the authority of the City of Miami to hold a voter referendum to approve a public housing project, the Florida Supreme Court in reaching its decision in Barnes recognized the authority of a local government’s legislative body to adopt an ordinance that waives provisions of its own ordinance code.

Additionally, in Cook v. Navy Point, Inc., the Florida Supreme Court considered whether the City of Ormond Beach could waive certain building permit fees required by ordinance, for the benefit of a housing project developer. The Court held that such waivers could not occur absent an ordinance, resolution or written contract as required by the city’s charter. 88 So.2d at 535. In reaching its decision, the Court recognized that the City of Ormond Beach by ordinance could have waived the existing ordinance code provision requiring the permit fees. Id. See also Parkway Towers Condo. Assoc. v.

Metro Dade County, 295 So.2d 295 (Fla. 1974) (recognizing a county's right to waive by ordinance, zoning restrictions in its zoning code).

Based on the foregoing cases and Charter provisions, the Council is allowed to waive the Ordinance Code provisions at issue. The specific Ordinance Code waivers in 2008-538 are discussed below.

3. Waiver of Ordinance Code Chapter 126.

The first waiver contained in 2008-538 is a waiver of, or exemption from, the competitive bidding requirements and procedures of Part 2 (Supplies, Contractual Services and Capital Improvements) and Part 3 (Professional Services Contracts) of Chapter 126 (Procurement Code), Ordinance Code. The basis of the exemption is Section 126.107(g), Ordinance Code, which exempts from City procurement requirements, supplies and services specifically authorized within the appropriating legislation. Alternatively, 2008-538 waives the competitive bidding requirements under Chapter 126.

The proposed exemption does not exactly fit the criteria of Section 126.107(g), Ordinance Code, because such code provision requires the exemption to be contained in the legislation authorizing the appropriation, and 2008-538 does not appropriate specific funding for the Agreement. Instead, the funding for the Landfill is included each year in the Solid Waste Division's budget, and it is not possible at this stage to determine the total appropriation that will be required for the future operations of the Landfill.

The exemption and alternative waiver in 2008-538 do not pertain to any matters that require competitive procurement under state law. As stated above, the Agreement expressly requires the Contractor to comply with the applicable state procurement laws (see Agreement sections 2.1 and 2.13). The only matters being waived or exempted in 2008-538 are the operations component of the Agreement (as to which no state procurement law applies), and small engineering and construction projects that are under the statutory threshold amounts in the applicable procurement statutes. Because the proposed waiver and exemption do not conflict with any state laws, the exemption and waiver are permissible exercises of the broad governance powers granted to the Council in the Charter.

Although state law does not require competitive bidding of local government service contracts like the operations component of the Agreement, Florida case law and statutes indicate that the public policy of the state is to competitively procure significant government contracts. For example, Chapter 287, Florida Statutes, contains the State's procurement code, which applies only to executive state government agencies, with the exception of Section 287.055, which also applies to local governments.²

² Section 287.055 applies to an "agency," which is defined as: "the state, a state agency, a municipality, a political subdivision, a school district, or a school board."

Section 287.057, Florida Statutes, applies to the “procurement of commodities or contractual services.” Under that section, state agencies are required to competitively bid service contracts in excess of \$25,000, which would include the operations component of the Agreement if it applied to a state agency. See Section 287.057(1)(a), Florida Statutes (requiring competitive bidding of state agency service contracts over the \$25,000 threshold amount in Section 287.017(1)(b), Florida Statutes). However, Section 287.057(1)(a) begins “Unless otherwise authorized by law...”, and thus the State Legislature could waive the applicability of this section to a specific contract if the waiver was “authorized by law” in state legislation.

The City’s Procurement Code found in Chapter 126, Ordinance Code, mirrors the state procurement code in many ways. For example, Chapter 126, Ordinance Code, requires competitive bidding of City service contracts, although the City’s threshold amount (\$50,000) is higher than the state threshold amount (\$25,000). See Section 126.102(f), Ordinance Code (applying \$50,000 threshold amount in Section 287.017(1)(c), Fla. Stat., to City service contracts). In the absence of the waivers of Chapter 126 in 2008-538, the City would therefore be required by ordinance to competitively procure the operations component of the Agreement. The Council may, however, lawfully waive the Chapter 126 competitive procurement requirements in this case because the matters to be waived are not otherwise required by state law.

Counsel for Contractor’s competitor Republic Services, Inc., has asserted that the Agreement must be competitively bid, and in support he cites to Mid-America Waste Systems of Florida, Inc. v. City of Jacksonville, 596 So.2d 1187 (1st DCA 1992), an opinion that was decided purely on a preliminary issue of standing. In that case, the Court held that plaintiff Mid-America had standing to seek injunctive and declaratory relief against awarding the Existing Operation Agreement to Contractor allegedly in violation of the public entity crimes provision of the City’s Procurement Code, Section 126.104. Thus, the Court reversed the order of dismissal.

The Mid-America Court in a footnote mentioned that the City after oral argument passed an ordinance purporting to waive Section 126.104 as it applied to the procurement of the Existing Operation Agreement. Id. at 1188 n. 3. The City then filed a “suggestion

287.055(2)(b), Fla. Stat. The remainder of Chapter 287 applies to an “agency” as defined as follows: “any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government.” 287.012(a), Fla. Stat. This latter definition does not include “municipalities” or “political subdivisions,” which are expressly included in Section 287.055(2)(b). The legislative intent section of Chapter 287 also refers to the applicability of the Chapter to “state agencies” and does not include any reference to local governments. See Section 287.001, Fla. Stat.

of mootness” in the appeal based on the new ordinance. Id. In response, the Court stated:

We decline the City’s invitation to dismiss the appeal as moot. To follow the City’s suggestion would render the competitive bidding process a nullity. Although the City could perhaps have waived the provisions of section 126.104 [the anti-crimes ordinance at issue] when it requested proposals, it is doubtful that the City at the outset would or could have waived the provisions of the ordinance at issue for one select individual or entity.

Id.

The Mid-America case is interesting because it applies to the award of the Existing Operation Agreement to Contractor by the City in the early 1990’s. It is distinguishable, however, because the City is currently waiving substantial portions of the procurement code up front in the original authorizing legislation and is not doing so in response to any litigation or bid protest, as occurred in Mid-America. Moreover, the City is not purporting to bid the contract competitively, but then favor one bidder over another, which was obviously the Mid-America Court’s concern. As the Court stated, waving certain provisions of the code in order to favor one bidder over another raises fundamental issues regarding the integrity of the bidding process. However, the Mid-America Court did not address the preliminary issue of whether bidding was required at all. That question is addressed by the Florida Statutes, which does not require competitive bidding of the Agreement.

Mid-America is also distinguishable because it involved a bid protest in connection with the competitive procurement of the Existing Operation Agreement, whereas the current matter involves an amendment and extension of that existing agreement. The City had no reason not to competitively procure the Existing Operation Agreement because the Landfill was new at the time. Presently, the Existing Operation Agreement has five to seven years remaining, and only the Contractor can agree to amend the Existing Operation Agreement by providing the City the reduced costs in the form of the lower per ton charge and assumption of the City’s current closure obligations for the Existing Cell.

Thus, the City cannot competitively bid the remaining five to seven year operations of the Existing Cell without terminating the Existing Operation Agreement and incurring potentially significant liability. The only way the City can reduce its per ton costs and eliminate its closure liability with respect to the Existing Cell is to enter into the Agreement, which in part amends the Existing Operation Agreement. The City could choose to keep the Existing Operation Agreement in place and competitively bid only the operations of the Expanded Cell, but in so doing it would lose the reduced costs and eliminated closure liability benefits in the Agreement pertaining to the Existing Cell.

For these reasons, the Mid-America court's discussion in a footnote of the City's waiver of the Purchasing Code in the early 1990's when the Landfill Site consisted of vacant, unimproved land, does not apply to the proposed Agreement that in part amends the terms of the Existing Operation Agreement. It is noteworthy that the Mid-America court remanded the case for a trial on the merits, and the City and Contractor prevailed at the trial, as evidenced by the Existing Operation Agreement, which has been in continuous effect since 1991.

The City Procurement Code reflects the state public policy of requiring competitive bidding of contracts like the Agreement. Nonetheless, the Council can waive the competitive bidding requirements in its own purchasing code, because such waiver is not in conflict with the general laws or Constitution of Florida. Absent a waiver or exemption by Council in 2008-538, the City could not enter into the Agreement. Instead, the City would be bound under the present terms of the Existing Operation Agreement for its remaining five to seven year life and would be required to separately procure a new agreement for the construction and operation of the Expanded Cell.

4. Waiver of Section 386.202(c), Ordinance Code.

Section 386.202(c), Ordinance Code, requires the inclusion of a specific termination date for a landfill service agreement such as the Agreement. The term of the Agreement, however, is based on the delivery of a certain number of tons of solid waste to the Landfill, as described in Section 4.2 of the Agreement, and the date that such tonnage amount will be reached is unknown. A specific termination date for a landfill service or operations agreement is not required by any state statute or constitutional provision. Based on the above Charter and case law, the Council may therefore waive the Ordinance Code provision requiring a specific termination date in the Agreement.

5. Waiver of Chapter 122, Part 4, Subpart B, Ordinance Code.

Chapter 122, Part 4, Subpart B, Ordinance Code, pertains to the disposition of City real property. It requires the Real Estate Division to investigate whether or not the City needs the property, and further provides for competitive bidding and an appraisal of the property. Proposed Ordinance 2008-538 waives such Ordinance Code provisions because Section 7.5 of the Agreement includes a purchase option ("Option") in favor of Contractor for the purchase of the Trail Ridge Landfill Site for fair market value under certain conditions.

The first condition to the exercise of the Option occurs if the City in its discretion decides to terminate the Agreement early without cause anytime after the Existing Cell stops receiving waste (i.e., beginning in approximately five to seven years). The second condition occurs only after the Expanded Cell is exhausted (in several decades), and only if the Contractor at that time demonstrates that the City failed to properly fund capital projects required to meet the maximum permitted capacity of the Expanded Cell as required under the Agreement (Section 2.18.2).

Thus, the Contractor's ability to exercise the Option does not arise, if ever, for years in the future, and the Option exercise depends upon some future discretionary action of the City. Proposed Ordinance 2008-538 waives the above Chapter 122 provisions because any sale of the Landfill would otherwise have to follow the competitive bidding requirements of Chapter 122 if the opportunity to exercise the Option did occur at some future date.

Under the above Charter analysis, the Council may waive Chapter 122 if there is no conflicting general law that would otherwise require the matters that the Council seeks to waive, i.e., the competitive bidding of the Landfill Site in this case. The Florida Statutes do not place any restrictions on the sale of property owned by cities, other than city property located in a community redevelopment area and the Landfill Site is not located in any such area. See generally Chapter 166, Florida Statutes, and Section 163.380, Florida Statutes. However, Section 125.35(1), Florida Statutes, requires counties to competitively bid the sale of county-owned property with certain notice requirements.

As an alternative to such competitive bidding requirements applicable to county-owned property, Section 125.35(3) permits a county by ordinance to prescribe disposition standards and procedures to be used by the county with certain minimum standards.³ Those statutory minimum standards are substantially set forth in Chapter 122 or other sections of the Ordinance Code. Thus, the City has effectively established the minimum procedures required by Section 125.35(3), Florida Statutes, and therefore Chapter 122, Ordinance Code, should supersede the mandatory competitive bidding requirements

³ Those minimum standards are as follows: (a) establishment of competition and qualification standards upon which disposition will be determined; (b) reasonable public notice of the intent to consider disposition of county property and the availability of copies of the standards, reasonableness of the notice being determined by the efficacy and efficiency of the means of communication used; (c) identification of the form and manner by which an interested person may acquire county property; (d) types of negotiation procedures applicable to the selection of a person to whom county properties may be disposed; (e) the manner in which interested persons will be notified of the governing board's intent to consider final action at a regular meeting of the board on the disposition of a property and the time and manner for making objections; (f) adherence in the disposition of real property to the governing comprehensive plan and zoning ordinances.

Section 125.35(3), Florida Statutes.

under Section 125.35(1), Florida Statutes, with respect to any sale of the Landfill pursuant to the Option.

The question therefore is whether the Council in 2008-538 can lawfully waive the competitive bidding requirements of Chapter 122, which were established as an alternative to the competitive bidding requirements that would otherwise apply to any sale of the Landfill Site under Section 125.35(1), Florida Statutes. For the reasons that follow, the Council should be able to waive Chapter 122 under the facts and law in this case.

As stated above, the competitive bidding requirements under Section 125.35(1) apply only to the sale of county-owned property. The Florida Statutes do not contain any similar competitive bidding requirements for the sale of property owned by cities (except in community redevelopment areas). Where there are different standards for cities and counties under Florida law, the Charter allows the Council to determine whether the City will be considered a county or a municipality with respect to such conflicting laws. See Charter Section 18.02⁴. Ordinance 2008-538 will therefore include an election for the City to act as a city and not a county in connection with any future sale of the Landfill pursuant to the Option. As a result, Section 125.35(1) should not apply to any potential sale pursuant to the Option, or to the ability of the Council to waive Chapter 122, Ordinance Code.

Additionally, the Option section of the Agreement (Section 7.5.3) includes the following provisions:

Notwithstanding anything herein, the Contractor's right to exercise such purchase option shall be subject to and may be superseded by the requirements of applicable law at the time governing the sale of real property owned by the City (including without limitation any Florida Statute requiring competitive bidding for the sale of municipal or county real property), other than a City ordinance that the City may lawfully waive in the opinion of the City's counsel.

Thus, the actual legal ability of the Contractor to exercise the Option will not be known until years and possibly decades in the future if and when the Option is triggered, and will depend upon any applicable general law at the time that may restrict cities or counties from selling property. The only exception would be City ordinances that the Council may lawfully waive in the opinion of the City's counsel. Despite the many

⁴ Charter Section 18.02 provides in part as follows:

For all purposes of general law, the consolidated government shall constitute a county and a municipality. If the general laws applicable to counties and municipalities conflict in any respect, the council may elect and determine whether the consolidated government shall be considered a county or a municipality for the purpose of such conflicting laws....

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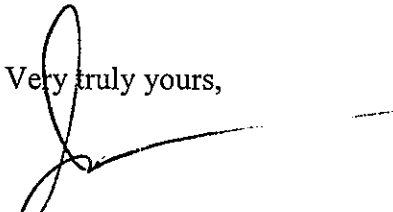
conditions to the exercise of the Option, the subject waiver is included in 2008-538 in case there are no applicable laws other than Chapter 122 at the time that any exercise of the Option might occur.

Based on the foregoing, the subject waiver of Chapter 122 in 2008-538 should be permissible.

6. Conclusion.

The Charter grants to the Council broad powers to enact legislation except where the legislation is in conflict with the general laws or Constitution of Florida. In this case, there are no provisions in such laws requiring the matters that 2008-538 seeks to waive, and Florida case law recognizes the authority of a local government to waive its own ordinance code. Accordingly, the subject Ordinance Code waivers in 2008-538 are permissible under Florida law.

Very truly yours,



John F. Germany, Jr.
Deputy General Counsel

cc: City Council Members
Richard A. Mullaney